

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Jessica R. Cooper, Presiding Judge

MARQUIS DYER
Plaintiff-Appellee,

v

Docket no. 123590

EDWARD P. TRACHTMAN, D.O.
Defendant-Appellant.

BRIEF ON APPEAL - AMICUS CURIAE MICHIGAN SELF-INSURERS' ASS'N

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**STATEMENT OF THE BASIS FOR THE
JURISDICTION OF THE COURT**

The Court has jurisdiction to review the opinion which was entered by the Court of Appeals in *Dyer v Trachtman*, 255 Mich App 659; 662 NW2d 60 (2003) by the authority of the Michigan Court Rules of 1985, MCR 1.101, et seq. MCR 7.301(A)(2). MCR 7.302(C)(2)(b).

The application for leave to appeal was filed with the Court within twenty-one days after the opinion of the Court of Appeals was entered.

STATEMENT OF QUESTION PRESENTED

I

WHETHER A DOCTOR HAS A DUTY TO A PLAINTIFF WHO IS AN EMPLOYEE DURING A FORENSIC EXAMINATION WHICH WAS REQUESTED BY A DEFENDANT WHO IS AN EMPLOYER BY THE TERMS OF A STATUTE IN THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

Plaintiff-appellee Dyer answers "Yes."

Defendant-appellant Trachtman answers "No."

Amicus curiae Michigan Self-Insurers' Ass'n answers "No."

Court of Appeals answered "Yes."

Circuit Court answered "No."

STATEMENT OF FACTS

Plaintiff-appellee Marquis Dyer (Examinee) was injured by a test that defendant-appellant Edward P. Trachtman, D.O. (Examiner) performed during the physical examination which had been requested by a defendant in the case of *Dyer v City of Detroit*, Circuit Court for the Third Judicial Circuit of the State of Michigan (Docket no. 96-646845-NO). *Complaint*, paragraphs 3-15, 19-20. (2a-4a)¹

The Examinee sued the Examiner² for failing "to practice medicine with the reasonable skill and competence of an average physician," *Complaint*, paragraph 17 (4a), for a battery, *Complaint*, paragraph 22 (5a), and for a breach of contract. *Complaint*, 26. (6a) The *Complaint* was accompanied by the statement of Erwin Feinberg, M.D., that, "the standard of care for an independent medical evaluator [is] that the physician must honor any . . . medical restrictions placed on the patient by the treating physician." *Affidavit of merit*, paragraph 4. (9a)

The Examiner appeared and asked for the peremptory dismissal of the *Complaint* in a motion for summary disposition which was based on the Michigan Court Rules of 1985, MCR 1.101, et seq., MCR 2.116(C)(1). *Motion for summary disposition*, paragraph 9, 11, 12. (12a-13a) The Examinee agreed that the claim of professional negligence and breach of contract should be dismissed, *Answer to Motion for summary disposition*, 7 (31a), but insisted that the claim of a battery was justiciable, *Answer to Motion for summary disposition*, 7 (31a), and asked to amend the *Complaint* to include a claim that the Examiner was negligent, grossly negligent, and intentionally injured the Examinee. *Motion for leave to amend Complaint*, 2. (39a)

¹ The facts described by the Examinee in the *Complaint* are presumed to be true and complete.

² The *Complaint* was filed with the Circuit Court for the Third Judicial Circuit of the State of Michigan but remitted to the Circuit Court for the Sixth Judicial Circuit of the State of Michigan as the court for the county where the injury occurred. (11a)

The Circuit Court for the Sixth Judicial Circuit of the State of Michigan (Trial Court) dismissed the *Complaint* and denied leave to amend the *Complaint*, *Dyer v Trachtman*, unpublished order of the Circuit Court for the Sixth Judicial Circuit of the State of Michigan, decided on May 4, 2001 (Docket no. 00-024036-NH) (71a-72a), with the decision that the claim of a battery and the proposed claims of negligence, gross negligence, and the intentional infliction of emotional distress were only characterizations of medical malpractice claims which were abandoned. *Transcript of hearing of motion*, 14-15. (68a-69a) Reconsideration was denied. *Dyer v Trachtman*, unpublished order of the Circuit Court for the Sixth Judicial Circuit of the State of Michigan, decided on May 31, 2001 (Docket no. 00-024036-NH). (73a-74a)

The Court of Appeals reversed and remanded the case only to allow amending the *Complaint* to claim negligence by the Examiner. *Dyer v Trachtman*, 255 Mich App 659, 661, n 1, 666; 662 NW2d 60 (2003). (124a-125a, 126a)

The Court granted leave to appeal and directed briefing the questions of whether Michigan physicians owe a duty on which the recipient of an independent medical examination can file a civil suit with no physician-patient relationship; whether a physician may be held liable for ordinary negligence in performing an independent medical examination; whether expert testimony may be used to establish a physician's duty in performing an independent medical examination; and whether a physician may have some limited professional duty in performing an independent medical examination. *Dyer v Trachtman*, 468 Mich 943; 664 NW2d 221 (2003). (127a)

ARGUMENT

I

A DOCTOR HAS NO DUTY TO A PLAINTIFF WHO IS AN EMPLOYEE DURING A FORENSIC EXAMINATION WHICH WAS REQUESTED BY A DEFENDANT WHO IS AN EMPLOYER BY THE TERMS OF A STATUTE IN THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

Whether a person has a duty to another is a question of law for the Court to decide de novo by assessing all of the considerations of policy that may apply. *Elbert v City of Saginaw*, 363 Mich 463; 109 NW2d 879 (1961). *Friedman v Dozor*, 412 Mich 1; 312 NW2d 585 (1981). *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999), reh den 461 Mich 1205; 602 NW2d 576 (1999). *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). In the case of *Elbert*, *supra*, 475-476, the Court recognized that,

"'[t]his Court,' we have held, 'is committed to the doctrine that where there is no legal duty there can be no actionable negligence.'

The commitment is not unique to us. It is the *sine qua non* of negligence law, the requirement (a 'duty') that people in an ordered society must conform to a certain standard of conduct in their relations one with another. Phrased in another way, the problem of duty is simply the problem of the degree to which one's uncontrolled and undisciplined activities will be curtailed by the courts in recognition of the needs of organized society. This determination those of the vicinage are not trained to make, however faultless their composite judgment may be as to which of their neighbors is lying and which is telling the truth. It involves, as we have seen, much of legal history, of precedent, of allocations of risk and loss. Prosser puts it succinctly. In discussing the apportionment of responsibilities between judge and jury he states among the duties of the court 'the determination of any question of duty—that is, whether the defendant stands in such a relation to the plaintiff that the law will impose upon him any obligation of reasonable conduct for the benefit of the plaintiff. This issue is one of law"

In the case of *Friedman*, *supra*, 22, the Court held that,

"[i]n a negligence action the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty.

Dean Prosser has said that ' 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff' and concerns 'the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other'. Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct."

In the case of *Maiden, supra*, 131, the Court again held that,

"[w]hether a duty exists to protect a person from a reasonably foreseeable harm is a question of law for the court. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997); *Trager v Thor*, 445 Mich 95, 105; 516 NW2d 69 (1994). 'A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.' *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)."

In the case of *Cardinal Mooney High School, supra*, 80, the Court established that, "questions of law are reviewed de novo."

The policies which the Court must consider in this process are expressed in legal history, precedent, and statutes that relate to the subject between two people. *Elbert, supra. Maiden, supra. James v Alberts*, 464 Mich 12; 626 NW2d 158 (2001). In the case of *Elbert, supra*, 476, the Court held that,

"... the problem of duty is simply the problem of the degree to which one's uncontrolled and undisciplined activities will be curtailed by the courts in recognition of the needs of organized society. This determination those of the vicinage are not trained to make, however faultless their composite judgment may be as to which of their neighbors is lying and which is telling the truth. It involves, as we have seen, much of legal history, of precedent, of allocations of risk and loss."

In the case of *Maiden, supra*, 132, the Court considered a statute that concerned the particular subject to decide whether one person had a duty to another by stating that,

"[i]n determining whether the relationship between the parties is sufficient to establish a duty, the proper inquiry is 'whether the defendant is under any obligation for the benefit of the particular plaintiff. . . .' *Buczowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992), quoting *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981). This analysis concerns whether the relationship of the parties is of a sort that a legal obligation should be imposed on one for the benefit of another. *Id.*

We need not apply the usual *Buczowski* common-law analysis, since statutory law provides that defendant owed no legal duty to plaintiff."

In the case of *James, supra*, 17-18, the Court once more considered a statute that related to the particular subject which was enacted after the decision by the Court to decide whether one person had a duty to another,

“[w]ith the introduction of worker’s compensation law in 1912, and the corresponding demise of the fellow-servant rule, the reasons for the volunteer doctrine had largely vanished. There remained no reason to legally disable volunteers because fellow servants were no longer without legal redress. This Court noted this in *Diefenbach v Great Atlantic & Pacific Tea Co*, 280 Mich 507, 512; 273 NW 783 (1937), where it held that this rationale for the doctrine

is rendered somewhat doubtful due to the provisions of the various workmen’s compensation acts declaring that the negligence of a fellow servant shall be no defense to an action against the employer for injuries sustained in the course of the employment.

The *Diefenbach* Court correctly concluded that the fellow-servant rule, which created the need for the volunteer doctrine, was no longer part of our law. This should have set the stage for the abolition of the volunteer doctrine. However, instead, the *Diefenbach* Court opted to retain the doctrine, stating at 512:

The better view would appear to be that the volunteer cannot recover because no duty is owed to him other than not to injure him by wilful and wanton acts.

Little analysis was provided for this new rationale, which arguably extended the doctrine to the context of direct liability. We note that it was unnecessary to resort to the volunteer doctrine in order to reach the conclusion that the plaintiff was not entitled to recovery from the store as traditional agency principles would have led to the identical result. All of which is to say that we believe it would have been better for the *Diefenbach* Court to opine, as Justice TALBOT SMITH did sometime later with respect to another antiquated rule:

The reasons for the old rule no longer obtaining, the rule falls with it. [*Montgomery v Stephan*, 359 Mich 33, 49; 101 NW2d 277 (1960).]

That we do today.”

While the precedent from other jurisdictions may be considered, the decision about the duty of one person to another cannot be based on a simple counting of the prior

decisions on a subject for and against a responsibility. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000). In deciding the duty which one person owed another, the Court announced in the case of *Stitt, supra*, 607, that,

“[w]e recognize that a majority of jurisdiction considering the issue have adopted the public invitee definition set forth in § 332 of the Restatement. However, in exercising our common-law authority, our role is not simply to ‘count heads’ but to determine which common-law rules best serve the interests of Michigan citizens. We believe that Michigan is better served by recognizing that invitee status must be founded on a commercial purpose for visiting the owner's premises.”

The Court cannot consider the views expressed by an expert in the subject of the relationship between two people such as a doctor in the field of medicine, a lawyer in the field of law, or an engineer in the field of manufacturing to decide whether one person had a duty to another. The views of an expert are important only to the jury to decide whether a particular person actually fulfilled a duty which has been established by the Court. *Elbert, supra*. In the case of *Elbert, supra*, 476-477, the Court held that,

“Prosser puts it succinctly. In discussing the apportionment of responsibilities between judge and jury he states among the duties of the court ‘the determination of any question of duty—that is, whether the defendant stands in such a relation to the plaintiff that the law will impose upon him any obligation of reasonable conduct for the benefit of the plaintiff. This issue is one of law, and is never for the jury.’ This is not to say, of course, that fact issues may never be involved in the application of the rule. In event ‘varying inferences are possible,’ in Mr. Justice Cardozo’s words, there is ‘a question for the jury.’ These questions may arise as to whether or not an area in which a hazard is created is an area within which humans normally move. The duty imposed in this area will depend upon the facts found respecting its use, but the enunciation of the duty upon the facts found is for the court, not the jury.

It is just at this point that serious error was committed below. The court, following defendant’s theory, charged the jury as follows:

‘Therefore, if you find in this case that this defendant Fattore Company could not reasonably foresee that a child too young to be guilty of contributory negligence would be in the streets without care or supervision, the defendant Fattore Company

would not be responsible and your verdict must be no cause of action as to the defendant Fattore Company.'

The court here is charging with respect to defendants' duty to children of plaintiff's class. Essentially the question is whether the interests of this class of plaintiff are entitled to protection against the defendants' conduct. Stated in another way the question is whether these defendants are under any obligation with respect to infants in this area. Are the infant children of the neighborhood within the 'zone of danger' with respect to the hazard created by the negligence of the defendant? This problem, as we have stated, is for the court, just as would be, for instance, the question of whether there is a landowner's duty of care towards an infant trespasser, or whether there is a duty owed by a manufacturer to the ultimate consumers of his product."

This is why the Court should not consider expert opinion to establish a physician's duty in performing an independent medical examination.

There are two statutes in the WDCA that concern the subject of a physical examination of a person by a doctor at the request of another person. MCL 418.315(1). MCL 418.385. Section 315(1) allows a physical examination of a person who qualifies as an employee by a doctor at the request of another person who qualifies as an employer for the particular purpose of providing medical treatment when there is no dispute that a personal injury was received arising out of and in the course of employment. Section 315(1) states that,

"[t]he employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, MCL 333.17401, as of May 20, 1992. An employer is not required to reimburse or cause to be reimbursed charges for services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by

the employee's spouse, brother, sister, child, parent, or any combination of these persons. After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reasons for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee."

The actual text of section 315(1), fifth sentence, requires a physical examination and treatment by a doctor chosen by the employer for ten days before the employee may choose another by stating that an injured employee may select a doctor only "[a]fter 10 days from the inception of medical care . . ."

Section 385 allows a physical examination of a person who claims to qualify as an employee by a doctor at the request of another person who is said to be responsible as an employer for the purpose of evaluating a claim to workers' disability compensation when there is a dispute about the very existence of an injury as well as an employee-employer relationship by stating that,

"[a]fter the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or the carrier. If an examination relative to the injury is made, the employee or

his or her attorney shall be furnished, within 15 days of a request, a complete and correct copy of the report of every such physical examination relative to the injury performed by the physician making the examination on behalf of the employer or the carrier. The employee shall have the right to have a physician provided and paid for by himself or herself present at the examination. If he or she refuses to submit himself or herself for the examination, or in any way obstructs the same, his or her right to compensation shall be suspended and his or her compensation during the period of suspension may be forfeited. Any physician who makes or is present at any such examination may be required to testify under oath as to the results thereof. If the employee has had other physical examinations relative to the injury but not at the request of the employer or the carrier, he or she shall furnish to the employer or the carrier a complete and correct copy of the report of each such physical examination, if so requested, within 15 days of the request. If a party fails to provide a medical report regarding an examination or medical treatment, that party shall be precluded from taking the medical testimony of that physician only. The opposing party may, however, elect to take the deposition of that physician."

A physical examination of a plaintiff by a doctor at the request of a defendant by the terms of section 385 is commonly known as a forensic examination because it applies without the actual existence of an employee-employer relationship as a person from whom workers' disability compensation is sought may deny that the claimant is not a person who qualifies as an *employee* and also request a physical examination to use the results to resolve a dispute. *Forensic* means *pertaining to or fitted for legal or public argumentation*. *Webster's Dictionary of the English Language Unabridged* (Deluxe ed). (*Webster's*). Indeed, *Webster's* describes *forensic medicine* as the *science concerned with the relations between medicine and law*. A physical examination of a plaintiff-employee by a doctor at the request of a defendant-employer by the terms of section 385 is not usually described as an *independent medical evaluation* because a very great number are performed by doctors at a plant infirmary who are also employees of the employer and cannot be fairly said to be *independent*.

There are three reasons that a doctor has no duty to a plaintiff-employee during a forensic examination which was conducted at the request of a defendant-employer by the terms of section 385.

A. A PLAINTIFF-EMPLOYEE RECEIVES NO BENEFIT FROM A FORENSIC EXAMINATION WHICH WAS REQUESTED BY A DEFENDANT-EMPLOYER.

An employee can benefit from a physical examination which is conducted to provide *treatment* for a personal injury. The physical examination which is allowed by section 315(1) applies when there is no dispute that the person qualifies as an employee who received a personal injury “arising out of and in the course of employment” and needs medical care whether recognized by the employer or determined by the Board of Magistrates after a hearing and resolving some dispute.

The benefit that an injured employee can receive from a physical examination conducted by a doctor at the request of an employer for treatment by the terms of section 315(1) is why the doctor has a duty to the employee during treatment and the employer has vicarious liability should the doctor fail that duty. *Pankow v Sables*, 79 Mich App 326, 331; 261 NW2d 311 (1977).

A plaintiff-employee cannot benefit from a forensic examination conducted by a doctor at the request of a defendant-employer by the terms of section 385. The occasion for a forensic examination occurs only when a defendant-employer denies responsibility for workers’ disability compensation and seeks evidence to actively oppose a claim before the Board of Magistrates which is the antithesis of a benefit for the plaintiff-employee.

A plaintiff-employee cannot benefit from the results of a forensic examination conducted by a doctor at the request of a defendant-employer by compelling treatment suggested for an injury that was discovered. *Blackwell v Citizens Ins Co of America*, 457 Mich 662; 579 NW2d 889 (1998).

In the case of *Blackwell, supra*, 664-665, the Court reported on how a doctor conducted a forensic examination of an employee by the terms of section 385 and recommended particular medical treatment for the personal injury which was discovered,

“[p]laintiff, a press operator, injured her hand and arm at work on August 21, 1989, when she slipped and struck her hand and arm on a table. She received treatment at the Garden City Hospital emergency room on August 22, 1989. Defendant Citizens Insurance Company of America, the worker’s compensation carrier of plaintiff’s employer, sent her to the Detroit Industrial Clinic, where she was examined on August 23, 1989. The Detroit Industrial Clinic referred her to Dr. Moossavi, who examined her on August 24, 1989. The clinic and Dr. Moossavi apparently prescribed minimal medical treatment for her injuries. Because plaintiff’s symptoms continued, Citizens sent her to Dr. Sahn for an independent medical examination, which occurred on January 10, 1990. In his January 22, 1990, report, Dr. Sahn’s diagnosis included RSD—reflex sympathetic dystrophy, and advised a particular course of treatment.”

In the case of *Blackwell, supra*, 670-671, 674, the Court unanimously agreed that there was no obligation of the defendant-employer to provide the medical care which was recommended by the doctor who performed the forensic examination because that forensic examination benefitted the defendant-employer and not the plaintiff-employee,

“[i]mplicit in a carrier’s duty under the WDCA to pay for reasonable medical treatment and its right to object to a claimant’s choice of provider is its ability to refer the claimant to a particular provider or recommend that a claimant get a second opinion. That the WDCA *permits* a carrier to undertake such actions does not impose any *duty* on it to do so.

Case law development acknowledges this active role for claimants, with carriers generally becoming active only when dissatisfied with a claimant’s choices. See *Dolenga v Aetna Casualty & Surety Co*, 185 Mich App 620, 624; 463 NW2d 179 (1990) (a worker’s compensation carrier’s role ‘is to pay for the treatment, not provide it’); *Reed v Top Notch Fence Installers*, 106 Mich App 248, 255; 307 NW2d 460 (1981) (the WDCA does not authorize granting the employer or carrier discretion over the choice of care).

In light of the active role for a claimant envisioned by the WDCA, a carrier lacks sufficient control over a claimant’s treatment to ‘conform’ treatment to a particular recommendation.

Moreover, this case implicates the sensitive question who makes decisions regarding treatment. To put carriers in this role would place them in a dictatorial position over claimants. Surely, it is repugnant to the existing policy of this state to strip from the injured person the ability to determine which of differing courses of medical treatment to follow and to pass such authority to claims representative of a worker's compensation carrier. However, a claimant's freedom to make treatment choices, like any freedom, is subject to mishandling and poor judgment and may result in unfortunate injuries as occurred here. Yet the remedy plaintiff proposes, which would strip away an injured claimant's ability to select among treatment options and give authority over treatment to the bureaucracy of an insurance company, has never been part of the WDCA, has never been endorsed in our case law explicating that act, and is not found in the contract at issue. (Indeed, if the contract contained any such provision, it would raise formidable questions about whether it is contrary to the public policy expressed in the WDCA.) Clearly, the current law does not give carriers such authority.

* * *

Plaintiff's theory that Citizens voluntarily assumed the asserted duties is grounded in *Smith v Allendale Mut Ins Co*, 410 Mich 685, 705; 303 NW2d 702 (1981), which states:

Section 324A of the [2] Restatement Torts, 2d, [p 142] provides that, in certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person is subject to liability if his 'failure to exercise reasonable care to perform his undertaking' results in physical harm to the third person.

While acknowledging this theory, *Smith* held that a fire insurer 'who does not undertake to inspect for the insured's benefit owes no duty to the insured or the insured's employees to inspect with reasonable care,' but is subject to liability if its affirmative conduct creates or increases a fire hazard. *Id.* at 706. The focus is on the purpose of the undertaking. Where a party undertakes services for his own benefit, rather than for the benefit of a plaintiff, it is not one of the 'certain circumstances' under which the 'voluntary undertaking' doctrine can be invoked." (emphasis by the Court)

A plaintiff-employee cannot benefit from the results of a forensic examination conducted by a doctor at the request of a defendant-employer to facilitate the care that another physician may provide because access is strictly limited and the only remedies for

a denial of access are available during a hearing of the contested claim for workers' disability compensation itself.

A plaintiff-employee cannot obtain the results of a forensic examination directly from the physician. Section 385, second sentence, allows an employee access to the results of a forensic examination only from the defendant-employer on request by stating that,

“[i]f an examination relative to the injury is made, the employee or his or her attorney shall be furnished, within 15 days of a request, a complete and correct copy of the report of every such physical examination relative to the injury performed by the physician making the examination on behalf of the employer or the carrier.”

A defendant-employer may not provide the results of a forensic exam after a request from a plaintiff-employee. The sanction for a denial of access is the bar to using the results of that exam during a hearing. Section 385, seventh sentence. Section 385, seventh sentence, states that, “[i]f a party fails to provide a medical report regarding an examination . . . that party shall be precluded from taking the medical testimony of that physician only.” While section 385, seventh sentence, sanctions the defendant-employer who denies a plaintiff-employee access to the results of a forensic examination, that statute does not actually give the plaintiff-employee access to the results themselves to allow use in treatment by another doctor.

Section 385, eighth sentence, does allow a plaintiff-employee some access to the results of a forensic examination. When a defendant-employer denies access to the results of a forensic exam after a request made by the terms of section 385, second sentence, a plaintiff-employee may schedule interrogation of the doctor. Section 385, eighth sentence. Section 385, eighth sentence, states that, “[t]he opposing party may . . . take the deposition of that physician.” This is not a fast and effective means of access to the results of a forensic examination to benefit a plaintiff-employee by facilitating care by another physician. Certainly, significant time may pass with the time for a request to be made and honored

(fifteen days), for the decision to depose the doctor, and to establish a particular time for the interrogation. People could meet, marry, and have a child more quickly. Also, the plaintiff-employee has the expense of a deposition to gain access.

While the results of virtually all forensic examinations are provided without a request and the remainder are provided when requested, section 385, second, seventh, and eighth sentences, establish that a plaintiff-employee has no real benefit by restricting access to the results of a forensic examination conducted by a doctor at the request of a defendant-employer by the terms of section 385, first sentence, and limiting the purpose for the access to an interrogation of that doctor.

A plaintiff-employee cannot benefit from a forensic examination conducted by a doctor chosen by a defendant-employer by the terms of section 385 because the plaintiff-employee cannot effect the examination. The plaintiff-employee must submit to the tests and interview by the doctor and cannot try to limit the exam to one or another system of the body or enlarge the exam to portions of the body that the employer has not asked about. Section 385, fourth sentence. Section 385, fourth sentence, states that, “[i]f he or she refuses to submit himself or herself for the examination [requested by an employer], or in any way obstructs same, his or her right to compensation shall be suspended . . .”

Section 385, fourth sentence, is why a plaintiff-employee must provide a history when asked and provide fluid samples and have exercise-type tests which the employee may think irrelevant. Section 385, fourth sentence, is why a plaintiff-employee cannot ask about a condition, say a hand problem, when the defendant-employer has asked for an evaluation of another condition, say a foot complaint. This all reflects that a plaintiff-employee is a subject for examination and the defendant-employer is the only person who may benefit from the forensic examination. And that is why the duty of the examiner is to the defendant-employer and never the plaintiff-employee.

B. THE STATUTE PROVIDES FOR A SAFE FORENSIC EXAMINATION BY A DOCTOR CHOSEN BY A DEFENDANT-EMPLOYER.

There is no need to allow a civil action for money damages for redress of an injury which a plaintiff-employee receives during a forensic examination as a device to promote a safe examination. There are two statutes in the WDCA which operate together to prevent injury to an employee during a forensic examination requested by a defendant-employer by the terms of section 385 and obviate the need for a civil action to redress injury for that purpose. Section 385, first sentence. Section 385, third sentence.

Section 385, first sentence, promotes a safe forensic examination by allowing a defendant-employer to choose only a licensed physician by stating that,

"[a]fter the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a *physician or surgeon authorized to practice medicine under the laws of the state*, furnished and paid for by the employer or the carrier." (emphasis supplied)

Section 385, first sentence, prohibits a forensic examination by a nurse, a physician assistant, a chiropractor, an emergency medical technician, or a pharmacist or any other person even though educated and trained in the field of medicine.

Certainly, section 385, first sentence, promotes safety and seeks to prevent injury by allowing only those who have met the highest standards to conduct a forensic examination, and obviates the concern about "the problem of the degree to which one's uncontrolled and *undisciplined activities* will be curtailed by the courts in recognition of the needs of organized society." *Elbert, supra*, 475. (emphasis supplied)

Section 385, third sentence, promotes safety by allowing a plaintiff-employee the right to have another doctor present during the forensic examination requested by a defendant-employer. Section 385, third sentence, states that, "[t]he employee shall have the

right to have a physician provided and paid for by himself or herself present at the examination.”

In the case of *Feld v Robert & Charles Beauty Salon*, 435 Mich 352; 459 NW2d 279 (1990), the Court recognized that allowing a doctor chosen by a plaintiff-employee to attend a forensic examination by a doctor selected by the defendant-employer promoted a safe and effective evaluation and a reliable result while having counsel for the employee present would not. In the case of *Feld, supra*, 366, the Court observed that,

“[s]ection 385 is designed as a factfinding process by which an employer or its carrier can gather medical information relevant to an injury sustained by an employee. The very presence of a lawyer for the examined party injects a partisan character into what should otherwise be an objective inquiry. *Warrick v Brode*, 46 FRD 427 (1969). Furthermore, we believe that the presence of an attorney at a § 385 examination would tend to promote an adversarial environment even before litigation has begun, thereby defeating the summary nature of workers’ compensation proceedings.”

Impediments to a safe and effective forensic examination include a language barrier, an employee who has difficulty with memory and with articulating complaints and problems, and simple conflicts between personalities as indicated in *Feld, supra*, 369-370 (BOYLE, J., concurring) which all are ameliorated by another doctor.

There is no discernable reason to create a standard of liability for a doctor who conducts a forensic examination at the request of a defendant-employer by the terms of section 385 as a way of promoting care and safety at all future exams when the statutes that are in the WDCA achieve that goal. Again, the problem about “the degree to which one’s *uncontrolled* and undisciplined activities will be curtailed by the courts in recognition of the needs of organized society,” *Elbert, supra*, 475 (emphasis supplied) which animates the problem of duty, *Elbert, supra*, 475-476, is not present when there are statutes which provide an effective protocol for control.

Finally, there are rules which may be applied to provide redress for injury that an employee or other examinee receives at a forensic examination. For example, the rule of premises liability applies to provide redress should a plaintiff-employee fall on the stairs, slip in the hallway, or tumble from a chair in the office while waiting for the forensic examination because the relationship then is between a property owner and an invitee and independent of a relationship of the subject of the physical examination itself. See *Stitt, supra*.

C. THE CONSEQUENCES OF ALLOWING A CIVIL ACTION FOR DAMAGES FROM A PERSONAL INJURY DURING A FORENSIC EXAMINATION BY A DOCTOR CHOSEN BY A DEFENDANT-EMPLOYER ARE PERNICIOUS.

There are no fewer than three pernicious consequences from any standard by which an examinee could pursue a civil action against a doctor for money damages to redress a personal injury that was received during a forensic examination. One is the immediate and irrevocable disruption of the administration of justice. The civil action which was the reason for the forensic examination itself and commonly known as the underlying lawsuit must stop when an examining doctor is sued and cannot proceed until that lawsuit is resolved whether a workers' disability compensation claim or a negligence claim as in this case. An examining doctor who is a defendant in a lawsuit will not be available as a witness in the underlying lawsuit because any testimony by the examining doctor as a witness in the underlying lawsuit may be concessions that could be used in the lawsuit in which he is a defendant. Without a resolution of the lawsuit against an examining doctor, the jurors in the underlying lawsuit will have to decide whether the plaintiff was injured by the defendant or the examining doctor or both. Certainly, the plaintiff will ask the examining doctor as a witness in the underlying lawsuit

Aren't you saying that there is no injury just to avoid your own liability as a defendant?

but the jurors have no way of assessing the truth of the answer when there is no resolution of the lawsuit against the examining doctor.

Another consequence that is harmful is increasing useless litigation. When a plaintiff can be said to benefit from the forensic examination which was conducted by a doctor who was chosen by the defendant in an underlying lawsuit to establish some sort of duty of the doctor as the basis for another lawsuit, the defendant in the underlying lawsuit can also be said to benefit from a forensic exam which was conducted by the doctor who was chosen by the plaintiff. Certainly, there is no articulate reason for limiting the metamorphosis of the idea of benefit to only the plaintiff in the underlying lawsuit. A ruling by the Court in this case involving the plaintiff in the underlying lawsuit against the doctor chosen by the defendant in the underlying lawsuit will be the authority for the case involving the *defendant* in the underlying lawsuit against the doctor who was chosen by the *plaintiff* to conduct a forensic examination.

In addition to the immediate problem about changing or abandoning the idea of benefit to establish some sort of duty by a doctor conducting a forensic examination requested by the defendant in an underlying lawsuit and the consequential problem of whether that change can or cannot be limited to the plaintiff-examinee to limit the volume of lawsuits against forensic doctors, there is a profound problem about the character of such a civil action. If available, both a plaintiff and a defendant in an underlying lawsuit can only be expected to sue the forensic doctor who was chosen by the opposing party whenever the results of that forensic exam are thought inimical to a claim or defense in the underlying lawsuit and avoided by converting the forensic doctor from an adverse witness to no witness at all. Recusal as a witness from the underlying lawsuit can be expected by the forensic doctor with the simple filing of a lawsuit against the forensic doctor who was chosen by the opposing party. Moreover, a claim by the forensic doctor that the lawsuit is meritless will be pro forma because the doctor will point to the injury claimed in the underlying action.

That will be met with the idea that discovery must be conducted because the party in the underlying lawsuit is already hostile (when the plaintiff is the examinee) or not present at the exam at all (when the plaintiff is the defendant in the underlying lawsuit). Litigation as a method to learn the truth and redress a wrong will be subordinated to the strategies to sequester witnesses by people who are already engaged in litigation.

Finally, any rule allowing an action against a doctor who conducted a forensic examination conflates other rules which are clear and established. For example, allowing a lawsuit against a doctor who conducted a forensic examination which was requested by an defendant-employer by the terms of section 385 conflates the clear and established rule of immunity when the forensic doctor is a co-employee of the examinee. In the case of *Szydlowski v General Motors Corp*, 397 Mich 356; 245 NW2d 26 (1976), the Court recognized that the immunity from liability which was WDCA established for co-employees³ applied to bar a medical malpractice action when the patient was an employee and the physician was also an employee of the same employer providing care at an infirmary at the plant. In the case of *Szydlowski, supra*, 358, the Court held that,

“[i]n *Solakis v Roberts*, 395 Mich 13, 20; 233 NW2d 1 (1975), we said that when ‘an employee’s injury is within the scope of the act, workmen’s compensation benefits are the exclusive remedy against the employer. MCLA 418.131; MSA 17.237(131).’ MCLA 418.841; MSA 17.237 (841) provides that ‘all questions arising under this act shall be determined by the bureau’.

³ MCL 418.827(1), first sentence, states that,

“[w]here the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person *other than a natural person in the same employ or the employer* to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section.” (emphasis supplied)

The circuit court complaint said plaintiff's husband was a GM employee who received injuries in the course of his employment. Defendant was said to have a statutory duty to provide medical service. This claim is based upon a section of the compensation act. MCLA 418.315; MSA 17.237(315). The complaint concerned matters for the Workmen's Compensation Bureau, not for the circuit court."

This clear and established rule means that an employee cannot sue a doctor who conducts a forensic examination at the request of an employer when that doctor is also an employee.

There is no articulate reason to actually allow a suit against a doctor who conducts exactly the same forensic examination of exactly the same examinee-employee at the request of exactly the same employer because a vendor relationship exists with the employer and not an employee relationship as in *Szydlowski, supra*. Indeed, this is the real reason for the precision of the ruling by the Court of Appeals in the case of *Rogers v Horvath*, 65 Mich App 644; 237 NW2d 595 (1975). In the case of *Rogers, supra*, 644, the Court of Appeals explained how an employer had retained a doctor to conduct a physical examination of an employee by the terms of section 385,

"[p]laintiff received workmen's compensation benefits from her employer, General Motors Corporation, for a shoulder injury. When the benefits were terminated, plaintiff filed a claim for continuation with the Bureau of Workmen's Compensation. Pursuant to its rights under the Workmen's Compensation Act, General Motors had plaintiff examined by the defendant, a licensed physician who is board certified in the specialty of orthopedics."

The only difference between *Szydlowski, supra*, and *Rogers, supra*, was the commercial relationship which existed between the physician who conducted the physical examination and the requesting party. In the case of *Szydlowski, supra*, the commercial relationship which existed between the physician and the party who requested the forensic examination was an employee-employer relationship. In the case of *Rogers, supra*, the forensic physician was a vendor to the party requesting the exam, not an employee.

The Court of Appeals did not dwell on this difference. It did not need to. The kind of commercial relationship between the physician who conducts a forensic exam and the party in an underlying lawsuit who asks for that examination as an employee-employer or vendor-vendee does not matter. It is the commercial relationship with the *examinee* that matters. And the Court of Appeals recognized that there was no action available because there was no commercial relationship between the examinee-employee and the forensic doctor-vendor in the case by stating in the case *Rogers, supra*, 646-647, that,

“[t]he term ‘malpractice’ denotes a breach of the duty owed by one in rendering professional services to a person who has contracted for such services; in physician-malpractice cases, the duty owed by the physician arises from the physician-patient relationship. No such relationship existed in the case at bar.”

Changing the idea of benefit to describe some duty of a forensic physician will collide with the clear and established rule of *Szydlowski, supra*, and *Rogers, supra*, and suddenly make the commercial relationship between the physician who conducts a forensic exam and the party who requests the examination important, if not paramount. In short, affirming the decision of the Court of Appeals in this case will result in forensic examinations by doctors who are employees of the same employer as the examinee when the examinee is an employee claiming workers’ disability compensation and that will only “Balkanize” the law.

RELIEF

Wherefore, amicus curiae Michigan Self-Insurers' Association prays that the Supreme Court reverse the opinion of the Court of Appeals.

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